IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
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No. 74-1137

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services,

Appellant,

against

RONALD MILNE, DOUGLAS STREETER, ROBERT C. LEE, JOE NATHAN BEVERLY, WILLIE BEVERLY, ODELL BEVERLY, and JOHN BEVERLY, by their mother and next friend, ROBERTA BEVERLY, individually and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

I.

The validity of the statute on its face is the sole issue on this appeal as it was the sole issue decided by the Court below and the sole issue which could be determined on summary judgment.

Appellees' brief is largely devoted to issues not raised by this appeal. One is led to believe that the District Court after a plenary trial made detailed findings of fact about the enforcement of NYSSL § 131(11) and avail-

ability of hearings to persons denied assistance under the section. But that is not the posture of this appeal. The decision of the three-judge court was limited to a finding that the statute was invalid on its face (Op. A. 567). Furthermore that is all the Court could determine on a motion for summary judgment. There were critical issues of fact between the parties as to the general administrative experience under the statute and the fairness of the procedures for reviewing denial of assistance. See Defendant Lavine's Statement Pursuant to Local Rule 9(g) (A. 503-6).

In *Wyman* v. *James,* 400 U.S. 309, 313 (1971), this Court expressed frustration that potentially significant factual issues regarding the validity of home visits to public assistance recipients had not been resolved in a proper plenary proceeding. Similarly, Justice Frankfurter in his dissent in *Adler* v. *Board of Education,* 342 U.S. 485, 497-507 (1952), warned against the consequences of a premature determination of the validity of hearing procedures which had not yet been fully developed. Any issue other than the validity of the statute on its face presented by this complaint must be determined in the first instance by the District Court.

Appellees did present to the Court below instances in which assistance improperly was denied to applicants, but for all the outraged verbiage those denials have not been shown to have been a result of enforcement of NYSSL § 131 (11), in general, or, of the presumption at issue on this appeal. Except for Joseph Beverly, none* of the

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* In the case of Streeter it might have been a question of fact whether his failure to appear at his job over the New Year's weekend was an absence, as he claimed, or voluntary termination as the Unemployment Insurance determination suggested (Pl. aff. Ex. A, A. 282). But the Westchester determinations stated that the Agency had found that he "was terminated" (Pl. aff. A. 278). Lee's absences also could have been construed as a voluntary termination but the County Department made no such finding (A. 72).

named plaintiffs voluntarily terminated his employment. Since § 131(11) applies only in cases where there is a voluntary termination, denial of assistance by the local agency to these plaintiffs was not pursuant to § 131(11), but in contravention of its express provisions. Similarly by its express terms the presumption at issue on this appeal only applies to an applicant who voluntarily terminates his employment. Therefore these plaintiffs were not injured by the imposition of the presumption but by a denial of assistance which ignored the express language of the presumption. They were denied assistance in spite of the statute, not because of it.

Furthermore, in some instances the statutory right to rebut was negated. While there has been no finding as to precisely what transpired in the County office on the application proceedings, the notices sent by the local agency to Milne, Streeter and Lee (Compl't. Ex. B, A. 29; Pl. Aff. Ex. A, A. 282; Pl. Aff. Ex. C, A. 72) suggest that there was no opportunity to rebut any finding. This suggestion is directly contrary to the statute. But because the denials did not rest on a finding that there was a voluntary termination of employment for the purpose of obtaining public assistance, the right to rebut the presumption which was not invoked would not be meaningful.

Therefore, these plaintiffs had a complaint—not against the statute they attacked, but against an administrative action which was repugnant to the statute. And, as egregious as these denials were, they do not support a finding that the statute on its face was invalid. The then Westchester County Commissioner, defendant Leonard Berman was represented in the District Court by the County Attorney. Because the decision below was limited to a finding on the statute and did not turn on any finding against him, defendant Berman did not appeal.

While there were too many unjustified denials of assistance, appellees have failed to show any widespread pattern

attributable to the language of the statute. It unambiguously applies only to voluntary termination of employment and the presumption is limited to those cases, as well. The presumption is also explicitly rebuttable.

Plaintiffs have shown 9 instances in which assistance was denied to persons who were fired from their jobs. In addition to the three named plaintiffs, appellees referred to the experience of Roy Levee (A. 38-48); Shirley Miller (A. 89-98); Ulysses Westbrook (A. 220-43); Anthony Brownlee (A. 296-307); Allen Phillips (A. 310-12) and Pat Scarfone (A. 313-21).* But this is not widespread misapplication of NYSSL § 131(11). Only 2 of these applicants were denied assistance outside of Westchester County: Levee in New York County and Westbrook in Monroe County. While 128,711 persons receive HR in New York City (N.Y. State Dept. of Social Services, *Statistical Supplement to Annual Report for 1973* [hereinafter *Statistical Supplement*] Table 6, row 2, column 17) the Court below was shown one case of misapplication of the statute and that was reversed by the local agency within 10 days (A. 104) by reference to the face of the statute and the local regulations (A. 456-8). Of the 4,116 persons receiving HR, in Monroe County (*Statistical Supplement,* Table 6, row 6, col. 17), the Court below was shown one case of misapplication of the statute. In the entire rest of the state in which 38,581 people receive HR (*Statistical Supplement,* Table 6, rows 3, 59, col. 17) there is no instance of misapplication of the statute. Even in Westchester 10 misapplications out of 4,672 HR cases (Statistical Summary, *supra,* Table 6, row 10, column 17) does not demonstrate a total disregard of the provisions of NYSSL § 131(11).

* Appellees referred to 7 other instances of denial introduced to protest the imposition of the presumption after the decision below was rendered, but before the Court's order was applied. All were corrected by the District Court order (A. 690). Terry Yant, Gladys Hart and Lowell Swanson admitted quitting their jobs well within 75 days of applying for assistance (A. 588, 592, 638). The record does not show whether they produced evidence to overcome the presumption at the local welfare office. No facts regarding John Hepler, James Maine or Sherry Murphy were alleged. Barbara Mankes claimed to have been fired and she was granted assistance (A. 633), but the Westchester Commissioner reconsidered the decision finding that she had provoked her discharge (A. 636). However she was entitled to assistance pending the determination at a state fair hearing which became unnecessary under the order issued by the Court in this case.

Nor did the State Commissioner acquiesce in the sporadic misapplication of the statute in Westchester County. When the pleadings in this case identified the problem, the Department issued guidelines which, by concrete examples, sought to avoid repetition of these mistakes (Def. Ex. A. 454-5; Def. aff. A, 447-8). Five of the 9 cases in which there was no justification for the denial were appealed to appellant, in each instance the State Commissioner of Social Services sustained the applicant's position: Brownlee (A. 306-7), Scarfone (A. 319-21), Miller (Apellees' Br. App. B), Streeter (A. 459-60) and Phillips (Appellees' Br. App. A). In three other cases the local agency itself, withdrew its decision: Milne (A. 505), Levee (A. 104), and Westbrook (A. 452). Robert Lee was granted assistance by the District Court in a preliminary injunction before he ever applied for state hearing and he defaulted at that hearing.

By contrast, Joseph Beverly freely admitted quitting his job and applying for public assistance four (4) days later (Pl. aff. A. 151-2, Def. Ex. "E", A. 467). Thus, the presumption was properly applied to him. At the fair hearing, the Commissioner concluded that he had quit for the purpose of qualifying for public assistance. He testified that it was not profitable to continue working (Def. Ex. "E", A. 470-1). His former employer remained willing to rehire Joseph and his brothers (Def. Ex. "E"). Ethel Reid's case was moot when she sought to intervene in this suit. She had been rehired by her former employer *and* she had been found eligible for unemployment benefits

(Pl. aff. A. 289). However, previously she had been found ineligible for public assistance in a decision which misstated the provisions of the statute and regulation to the effect that it precluded eligibility for public assistance for 75 days for one who had voluntarily terminated her employment (P. Ex. "D", A. 295). The statement excludes mention that a finding of ineligibility proceeds only from a purpose to qualify for public assistance or for a larger amount thereof. However, the presumption is not mentioned and apparently played no part in the mistaken decision.

By attacking the application of NYSSL § 131(11), appellees are attempting to convince this Court to sit as a trier of fact in the first instance and to pass upon narrow issues of statutory application which were not determined by the District Court. Indeed, they are not put in issue by the facts of the Beverly case, the only live controversy before the three-judge court.

In *Barr* v. *Matteo,* 355 U.S. 171 (1957), the Court of Appeals had affirmed a libel judgment on the ground that as a government official the defendant was not absolutely immune from libel, but it did not pass upon the defense of qualified privilege. This Court found that it was proper to pass on the narrower grounds first, but it did not rule on those grounds, itself. It remanded the appeal to consider the question of qualified privilege. In *Logue* v. *United States,* 412 U.S. 521, 532-3 (1973), the case was remanded to consider the individual liability of a deputy marshal which had not been adequately reviewed by the Court of Appeals. In *Swanson* v. *Traer,* 354 U.S. 114 (1957), a holding by the District Court on the ability of a stockholder to sue on behalf of the Corporation had not been reviewed by the Court of Appeals and for this reason the case was remanded. In *Northern Pacific Railway Co.* v. *Concannon,* 239 U.S. 382, 387-8 (1915), this Court found the decision below to have rested on a finding

of adverse possession based on an erroneous interpretation of a statute. It remanded to consider whether the possession might have occurred before the effective date of the statute. In *United States* v. *Rice,* 327 U.S. 742, 747 (1946), this Court stated that the scope of review is limited by the judgment appealed from and suggested that that is true even where the case arises on a certified question.

Furthermore, the issues on appeal are framed by the questions presented which in this case did not raise any issue of enforcement of the statute. In *United States* v. *Arnold Schwinn & Co.,* 388 U.S. 365, 377 (1967), this Court held that since appellees did not appeal, the issues were framed by the Government. In *Phillips Chemical Co.* v. *Dumas Independent School District,* 361 U.S. 376, 386 (1960), reh. den. 362 U.S. 937, this Court warned against interpreting its decisions as dispositive on issues not raised in the jurisdictional statement. In *Phillips,* this Court also noted that an issue which was severed by the District Court for later decision could not be considered on appeal. Here, appellees' claims regarding the application of NYSSL, § 131 (11) were not reached by the District Court and may not be reviewed on this appeal.

The issues* before this Court involve only the validity of NYSSL, § 131(11) on its face—whether the facts proven are rationally related to the fact presumed (Question 1) and whether the statute precludes the applicant from presenting his defense. See *Mobile, J. & K.C.R. R.* v. *Turnipseed,* 219 U.S. 35, 43 (1910) (Question 2). Appellees have not shown the statute to be invalid on either account, as demonstrated in appellant's brief and reiterated briefly in Points II and III which follow.

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* The third question involving the extension of the order to AFDC recipients is no longer at issue between the parties (Appellees' brief, pp. 122-3).

II

Appellees have failed to prove that there is no rational connection between the facts proven—voluntarily termination of employment and subsequent application for public assistance—and the fact presumed—a purpose to qualify for public assistance. Indeed, there is a close logical relationship sufficient to sustain the rebuttable presumption.

Appellees concede that the validity of the presumption contained in NYSSL, § 131(11) is governed by the rule in *Mobile, J & K.C.R.R.* v. *Turnipseed,* 219 U.S. 35, 43 (1910) —"it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed". (Appellees' br., pp. 51, 85; Also see Appellant's br., pp. 25-6, 31). Yet, they fail to rebut the inherent reasonableness of the presumption which relates the voluntary rejection of one source of income with the affirmative application for another in a relatively short time. For a presumption to fail under this test, there must be no rational connection. The asserted relationship must be "purely arbitrary". Appellees' brief does not meet this stringent standard. Instead, they theorize and moralize about the innermost yearnings of the poor, including people who have not applied for public assistance (Appellees' br., pp. 71-72, 78) and people who have not voluntarily terminated employment (Appellees' br., pp. 77, 79-80). Indeed, in all of appellees' general discussions of poverty there is not one word about people who voluntarily terminate employment and who apply for public support within 75 days, the only people to whom the statute applies.

Most of the extensive non-legal material cited relates to the larger public policy question whether the Federal Government should provide assistance to able-bodied em-

ployable persons—"the working poor". But, despite the emphasis on this question in Appellees' brief, it is not on point. Appellant and his predecessors have consistently supported programs to extend assistance to employable individuals. E.g. D. Moynihan, *The Politics of a Guaranteed Income,* 169-70, 202-3, 322, 367, 415-7, 517-8 (Vintage 1973). More concretely, New York does provide support for employable persons who have insufficient resources to support themselves. That is precisely the assistance which appellees were seeking. NYSSL § 158(a). Compare the laws of Arizona (Ariz. Revised Stats., Vol. 15 § 46-233[A][3]) and Delaware (Dela. Code, Title 31 § 503[a]) which do not provide any assistance for any employable person.

The issue confronting the Legislature was not whether employable persons should receive assistance but, whether they should receive it right after they quit a job. The fact that New York has chosen to grant assistance to employable persons does not preclude it from limiting assistance to persons who voluntarily impoverish themselves to qualify for that public support. Hawaii does not provide assistance for a person who is unemployed because of a voluntary separation without good cause or for misconduct." (Hawaii Revised Stats., 1974 Suppl't, Vol. 4, Titles 16-21, Chs. 281-400 § 346-71[1]). Such conduct produces permanent ineligibility, not just for 75 days as it does in New York. New Jersey prohibits "Assistance to the families of the working poor for 90 days after a voluntary cessation of employment. 44 N.J. Stats. Ann. § 13-3(a). The Hawaii and New Jersey statute apply even if the person who voluntarily terminated his employment had not intended to apply for public assistance. The New York Legislature chose not to deny assistance to persons who recently voluntarily terminated their employment but did so with no intention of relying on the public for their support. Even for those people, the Leg-

islature chose not to make them permanently ineligible. Virginia has an identical law. Code of Va. Vol. 9A, 1975 Supplement § 63.1-133.12. This is a carefully drawn statute applying in a limited number of cases, but it is to be expected that it would have a significant impact. When there are 176,080 persons receiving Home Relief (*Statistical Supplement,* Table 6, row 1, column 17) at a cost to State and local government for benefits, alone (excluding medical assistance, food stamps and other services), of $274,834,000 (Statistical Supplement, Table 1, row 24, cols. 1, 3, 5), statutes which govern only a minority of recipients are, in absolute terms, of enormous significance.

Plaintiffs have not shown that as applied to the limited number of people who voluntarily terminate their employment and within 75 days apply for public assistance, the presumption is irrational. There is no empirical data on the behavior of that group. However, the reports on the group most relevant to this case closest were not cited by appellees. There have been two studies devoted to employable public assistance recipients in New York and they both suggested that the availability of public assistance was a disincentive to work for a significant number of these people.

> "But the obstacles to the employment of the welfare employables do not lie solely in their lack of education and training. Many tens of thousands of men and women with less than a high school education are employed throughout New York State in a variety of jobs in both private industry and public agencies . . . it is significant that neither the employable welfare clients nor the employers believe that it is a lack of jobs which is the major obstacle to employment.
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> "A majority of the welfare employables express their attachment to the work ethic in a variety of ways—they like work; they would prefer to work even if the return were no greater than from welfare, and they feel they can or could make ends meet on the wages they do or would earn. But there is a significant minority which feels differently. About a third of the employables who are not working regard work as drudgery or have mixed feelings about working. . . . Further, among those who are not working, 17 percent express a definitely negative view toward work which provides earnings no greater than are obtainable from welfare. An additional 20 percent feel they could not live on such wages . . . ." (marginal notes omitted). B. Bernstein, M. Rowan, A. Shkuda, *Obstacles to Employment of Employable Welfare Recipients,* pp. 84-5 (Center for New York City Affairs, New School for Social Research [1974] [mimeograph]).

Interestingly enough, this study found that most employable public assistance recipients believe that in most welfare families there are employable recipients who can, but won't work (B. Bernstein, et al. *Obstacles to Employment, etc., supra,* p. 56):

> "Of the 55 percent who say there are able-bodied persons in welfare families who can but won't work, almost half attribute this situation to laziness and another 17 percent to the lack of financial incentive to work instead of remaining on welfare. Only a minority—18 percent—claim that jobs or training are not abailable for such people. This is a startling finding coming as it does from employable welfare recipients. Though startling, it is confirmed to some extent by the response to another question as to why, in their view, the welfare caseload declined during the preceding year. While a third did not know or did not respond to the question, and somewhat more than a third

thought it was because more jobs were available, about 17 percent believed it was due to a tightening up of the welfare system."

Employable public assistance recipients are in a position to assess the relative advantage of receiving assistance and working at a job of which one is capable. Most regard the availability of assistance as significantly attractive. This should not be unexpected if we recognize the actual value of eligibility for public assistance (B. Bernstein, A. Shkuda, E. Burns, *Income Tested Social Benefits in New York, Adequacy, Incentive and Equity* pp. 138, 142, Studies in Public Welfare, Paper No. 8, Printed for the use of the Joint Economic Committee (GPO # 5270-01862):

"If a four-person family is without income from earnings or other sources such as pensions, interest, or dividends, table 1 reveals that benefits from public assistance, food stamps, and school lunches equal approximately $4,400. If medical care is included, the benefits equal $5,400 for the female-headed household and $5,600 for the intact family. . . . These are net figures however; when translated into the gross income equivalent, the combination excluding medical assistance equals approximately $5,500; including medical assistance, this combination of social programs provides the equivalent of $7,000 for either the intact or female-headed family of four.

"It is of some interest to compare the gross income equivalent of the benefits of these four basic programs —public assistance, food stamps, school lunches, and medical assistance—with the cost of the Bureau of Labor Statistics lower level of living, sometimes known as the city wage earners budget, for the New York area, a level which is considered a decent standard for the family with an employed wage earner.

"In autumn 1971 prices, this was $7,578; when rough

account is taken of price increases between 1971 and 1972, the cost may be put at about $7,880 in 1972 prices. Thus, what may be called the universal package of social program benefits is within about 11 percent of the BLS lower level of living . . . any package of programs which provides the equivalent of 89 percent of the BLS lower living standard must be described as a fairly high standard. It is the equivalent of what a wage earner working a 35-hour week at $3.80 per hour would earn.

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"• • • for those who, because of limited education and skills, or because of discrimination, or other reasons, are unable to earn more than $6,000 to $7,000 per year, the present set of eligibility criteria for benefits from the major social programs does not provide any incentive to increase income. In fact, the result is quite the contrary."

New York's special grant for shelter which provides the amount actually paid and which permits rental arrears to be advanced is also an attraction of public assistance as opposed to employment. Joseph Beverly stated that it was not worth it to him to work because his shelter costs were too high (transcr. def't Ex. E. 4.473). He had already been evicted for failure to pay rent (Pl. aff. A. 150). Mr. Lee was three months behind in his rent when he applied for assistance (Pl. aff. A. 63-4). Every other proposed plaintiff alleged an inability to meet his rental payments at the time he applied for assistance: Milne (Pl. aff. A. 12), Levee (Pl. aff. A. 39), Streeter (Pl. aff. A. 53), Miller (Pl. aff. A. 90), Westbrook (Proposed Compl't A. 232), Reid (Pl. aff. A. 287), Brownlee (Pl. aff. A. 297), Phillips (Pl. aff. A. 311), Scarfone (Pl. aff. A. 314). Very few jobs would yield the immediate lump sum benefit of a rental check.

The mandatory New York State work rules were found to be a reasonable exercise of legislative power by this Court. *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 413, (1973):

> They ". . . embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments . . ."

If appellees' theory that nobody who could work would seek public assistance were true, there would have been no need to make the rules mandatory—or any reason for that matter, for Congress to enact WIN (42 U.S.C.A. § 602 [a][19]). If there were no person for whom public assistance was an attractive alternative to work, 53,000 recipients in the first year of operation would not have failed to comply with the work rules, although this meant loss of assistance. B. Bernstein, *Obstacles to Employment, supra,* at p. 2, n. 4.

Appellees seek to turn the precedential importance of *Dublino, supra,* on its ear by claiming that, since New York has the work rules, a millenium of some sort has been reached and there is no further need for restrictions on eligibility for employable recipients (Appellees' Br., pp. 50, 66-68). Unfortunately, however, all employable recipients are not immediately returned to the work force by operation of these rules. Only 12% of the employable persons on welfare are placed in jobs and only 30% are even referred to a job. B. Bernstein, *Obstacles to Employment, supra,* p. 3. Therefore, public assistance is still an alternative to work. Secondly, if one's purpose in quitting one's job was to obtain public assistance instead of working at a particular job found to be unpleasant, the work rules would not deter the application. Yet, NYSSL

§ 131(11) would encourage that person to remain with that job until he found a new one.

Appellees' speculation (br. pp. 58-60) that persons quit employment for reasons other than to enable themselves to apply for public assistance is not responsive to the problem addressed by the Legislature. It is not inconsistent with a purpose to qualify for public assistance to quit one's job because of a personality conflict with an employer. Both might simultaneously motivate a person. It might be more useful to ask "If public support were not available, would this person have terminated his employment?" If a person quits without providing for himself even the most basic necessities, it is reasonable to presume he expects that someone else will come to his aid. This statute removes public assistance as an alternative to self-support for a reasonable time after the termination of employment.

Since Appellees cannot prove that the 131 (11) presumption is irrational, they insinuate that something more than rationality must be shown, citing criminal cases in which it has been required that "the presumed fact is more likely than not to flow from the proven fact on which it is made to depend." *Leary* v. *United States,* 395 U.S. 6, 36 (1969) (Appellees' br. pp. 54-5). But criminal cases raise problems which are not present in civil cases, especially like this one where the burden of proof has not been disturbed (See Appellant's br. pp. 33-4, 51). In a case like this, the precise measure of likelihood is not known or knowable. This is a common problem in cases where presumptions are used. For example, the presumption that a gift was made in contemplation of death if it was made within three years of the donor's death (26 U.S.C.A. § 2035) was not enacted after Congress had sought to prove the likelihood of the presumption on the basis of empirical data. The Enoch Arden statutes are not based on empirical findings that more persons who

have not been home for seven years are dead than alive. The measure of a legislative presumption is "some rationality". Other standards are used when determining whether there is a permissible judicial presumption or inference. For example, in *Greer* v. *United States,* 245 U.S. 559 (1918), Mr. Justice HOLMES referred to "common experience" in finding that there was no presumption of good character in criminal cases. It is not judicial, but legislative, experience which is at issue here and legislative findings are entitled to special respect, e.g., *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802, 809 (1969). When reviewed by this Court the presumed fact need only have some relationship with the proven facts.

The decision in *Goddis* v. *Wyman,* 304 F. Supp. 717 (N.D. N.Y.), *aff'd sub nom. Wyman* v. *Bowens,* 397 U.S. 49 (1970), is not to the contrary. The Court refused to determine whether the rebuttable presumption was valid. *Id.* at 722. It found instead that the New York's durational residence statute had as its purpose to deter travel into the State and that that impermissible purpose was fatal to the statute under the principles of *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). The purposes of this statute—to encourage persons to be self-sufficient and to allocate finite state resources to persons most in need of public support—are not only constitutional, but laudable. See *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405 (1973).

Appellees also rely on two cases involving Wisconsin employment rules which do not advance their argument. *Arteaga* v. *Silverman,* 56 Wis. 2d 110, 201 NW 2d 538 (Sup. Ct. Wis. 1972); *Garcia* v. *Silverman,* 393 F. Supp. 590 (E.D. Wis. 1975). The Supreme Court of Wisconsin interpreted state provisions defining eligibilty as precluding the County's determination that Mr. Arteaga's previous voluntary termination of employment rendered him

ineligible for public assistance. *Arteaga* v. *Silverman, supra.* The Court held that the Wisconsin law requiring recipients to accept jobs and training established only a condition for continued eligibility but did not create a bar to initial ineligibility. *Id.* at 201 NW 2d 542. Here the issue is whether a statute which does temporarily bar eligibility in some cases of voluntary termination is valid.

The Federal District Court's decision in *Garcia, supra,* is not analogous to this appeal. In that case an administratively created irrebuttable presumption was declared invalid under the general principles enunciated by this Court in such cases as *Vlandis* v. *Kline,* 412 U.S. 441 (1973) (See Appellant's brief, pp. 31-33). The county administrative letter provided that if more than once within the previous 12 months a person quit a job or was fired through his own neglect. it was conclusively presumed that he was presently unwilling to work. As in other conclusive presumption cases, the Court found that the evil lay in not allowing the applicant an opportunity to rebut the presumption such as is provided in this statute. Rebuttable presumptions are the other side of the coin and under the same analysis are found to be valid.

As we have noted, NYSSL § 131(11) serves important State purposes: (1) requiring self-support for a period after voluntary termination of employment, (2) deterring New Yorkers from voluntarily terminating employment without the means of subsistence for the near future, and (3) apportioning the finite sums available for the relief of poverty to the use of persons who are most in need. The presumption is important in effectuating those purposes efficiently, uniformly and fairly. Since the applicant always knows why he terminated his employment and since the Department of Social Services does not, it would be burdensome for the local agency to have to offer affirmative evidence in each case.

It is possible that under other statutes and regulations (Appellant's br. pp. 47-8), an applicant could have been required to prove that he did not terminate his employment for the purpose of obtaining public assistance without this specific presumption. However it is fairer to the applicant and to the public to have that duty clearly enunciated and uniformly applied.

In any event, the injunction of this presumption now could be interpreted to prevent the local agency from making such requests for affirmative proof of motive unless the decision is reversed.

There is nothing inconsistent in Appellant's position that the presumption is necessary and his position that it is easy for a person who did not terminate his employment for the purpose of obtaining public assistance to overcome it. Because the relevant information is ordinarily available to the recipient it is easy for him to rebut the presumption when it is contrary to the facts; but because the Department would not be able to prove the applicant's purpose, the presumption is necessary.

III

Appellees have not proven their claims of denial of due process of law—that review of denial of assistance to them should take precedence over other fair hearings, that they are entitled to receive assistance after it has been denied or that they have no opportunity to rebut the presumption at the local agency.

Appellees continue to assert that the statute permits rebuttal only in a State fair hearing (Appellees' br. pp. 90-1); but appellant demonstrated that the initial rebuttal occurs in the local Social Services District (Appellant's br. pp. 44-8). Appellees point to the notice sent to Milne which implied that he did not have an opportunity to ex-

plain his termination of employment (Appellees' br. pp. 90-1); but as unfortunate as the erroneous initial proceedings were in that case, they were not based on the presumption or any other aspect of NYSSL § 131(11) (See *ante*, at pp. 2-4).

Appellees claim that they are entitled to have their claims heard before those of recipients who have not recently voluntarily terminated employment. However, they have not shown that a finding of ineligibility for a limited period entitles one to consideration superior to those who have been found ineligible indefinitely. The New York State Department of Social Services must schedule an average of 8,300 fair hearings every month (Appendix "A", *post* at p. 1a). Most of the people requesting those hearings claim to be in exigent circumstances. It is the unfortunate fact that Appellant is in the business of assessing and relieving exigencies. Appellees have not shown that they deserve precedence over anyone else. Their case will not become moot. They have the right to reapply for assistance after 75 days even if the Agency's determination has been sustained. An examination of the enormous volume of hearings which must be scheduled each month demonstrates that speed and efficiency would be sacrificed if the Department were required not to fill up its hearing schedule, lest some recently employed applicant demand an immediate hearing.

Even so, hearings in these cases have not been unduly delayed. Joseph Beverly's request for a fair hearing was received on February 26, 1974. A hearing was held on March 14 and a decision rendered on March 28 (Dft. aff. Exs. D to E, A. 461-8).

Allen Phillips was denied assistance on March 8, 1974 and his fair hearing was held on April 4, 1974 (appellees' br. App. "A"). Shirley Miller first applied for public assistance on January 14, 1974, and a fair hearing was held

on February 19, 1974 (Appellee's App. "B"). Anthony Brownlee was denied assistance on April 18, 1973, the day he applied. The hearing was held on May 8, 1973 and the decision was rendered on May 22, 1973.

Furthermore, the New York Court of Appeals in *Jones* v. *Berman,* 37 N.Y.2d 42, 371 N.Y. Supp. 2d 422 (1975), held that expedited appeals from denials of emergency assistance must be provided. Such assistance is available to HR recipient families, as well as to AFDC families. 18 NYCRR § 358.28; 75 Administrative Letter 78 (Aug. 8, 1975).

However details of the actual practice in holding hearings are not properly raised on this appeal since the Court below specifically refused to pass on the question (Op. A. 567) and there are hotly contested issues of fact which separate the parties. (See *ante,* at p. 2).

Appellees' most startling claim is that an applicant for public assistance should be entitled to receive that assistance after he has been found to be ineligible. This assertion is based on several faulty premises. The first and shakiest is that because he has been found to be ineligible under § 131(11) for seventy-five days, he has been found to be eligible in all other respects and has thus been deprived of benefits previously enjoyed as were the Appellees in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) (Appellees' br. pp. 96-101). However persons found to be ineligible under NYSSL § 131(11) are not by that, or any other, token found to be eligible in all other respects. In fact they have not been found to be eligible at all. No statute or regulation contemplates the two-step procedure concocted by Appellees.

Secondly, Appellees suggest that the Agency might have so much difficulty in making a correct decision based on a presumption that they are likely to make mistakes in determining eligibility (Appellees' br. pp. 101-7). The

solution proposed by Appellees is ludicrous—that all applicants be granted assistance unless and until a fair hearing concludes that they are not entitled to relief. It is hard to take a suggestion like that seriously. It has no safeguards against any erroneous self-serving application. The potential for error under this proposal is staggering as is the danger of careless divergence of public welfare funds from the needy to those who quit their jobs and then demand assistance.

The third misconception advanced by Appellees is that a person who has been found to be ineligible for 75 days is in a worse situation than one who is found ineligible indefinitely. This formula is contrary to fact.

The pre-termination hearing of *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), is required only when a person is cut off from welfare benefits currently enjoyed. This Court even refused to apply that principle automatically in cases of reduction of benefits. *Daniel* v. *Goliday,* 398 U.S. 73 (1970). To require such a hearing before an application can be denied would create hardship for the public and for other needy people which is unnecessary.

The procedures provided by appellant to review the denial of state assistance fully comports with due process of law.

In sum appellees have failed to show that the presumption is unreasonable or that the procedures for enforcing it are unfair.

CONCLUSION

For the foregoing reasons and those stated in appellant's main brief, the final judgment and order of the three-judge District Court should be reversed and summary judgment granted to appellant.

Dated, New York, New York, Nov. 23, 1975.

Respectfully submitted,

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APPENDIX A

DEPARTMENT OF SOCIAL SERVICES
FAIR HEARING TREND REPORT
1975

	JAN	FEB	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPT
FAIR HEARING ACTIVITY									
1. Requests	6,407	5,751	7,004	8,669	7,557	7,909	7,595	6,256	6,928
2. Cases Closed									
a. By Decision	3,605	3,158	3,211	3,620	3,512	3,809	4,209	3,536	3,829
b. By Withdrawal or Abandonment by the applicant/recipient	4,062	3,141	3,976	4,103	3,612	3,149	3,117	3,528	4,382
WORK COMPLETED DURING MONTH									
1. Fair Hearings									
a. Scheduled	8,570	6,911	7,728	9,267	8,990	8,361	8,631	8,197	8,038
b. % Held	43	45	46	51	53	48	46%	44	45%
c. Aid Continuing* Held	1,244	1,489	1,515	2,041	2,087	1,819	2,142	1,492	1,502
2. Hearing Officers	51	53	53	53	53	53	53	52	53
3. Hearings Scheduled/Officer	168	130	146	175	169	158	163	158	152
4. Decisions/Officer	73	60	61	68	66	75	79	69	68

* Cases in which, until the decision is rendered, persons continue to receive benefits to which the local agency has found they are not entitled. See *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

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